SUPREME COURT, U.S.

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IN THE

# Supreme Court of the United States

**October Term, 1964.**

**No. 420**

**RAYMOND COHEN,**
**JOHN JOSEPH ELCO,**
**JOSEPH E. HARTSOUGH,**
**ABRAHAM D. BERMAN,**

*Petitioners,*

*v.*

**COMMONWEALTH OF PENNSYLVANIA,**

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1964.

RAYMOND COHEN, JOHN JOSEPH ELCO, JOSEPH E. HARTSOUGH AND ABRAHAM D. BERMAN,
*Petitioners,*

*v.*

COMMONWEALTH OF PENNSYLVANIA,
*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

*To the Above, the Chief Justice and the Associated Justices of the Supreme Court of the United States:*

RAYMOND COHEN, JOHN JOSEPH ELCO, JOSEPH E. HARTSOUGH, and ABRAHAM D. BERMAN respectfully petition by their counsel, ABRAHAM J. BREM LEVY, EDWARD DAVIS, JOHN PATRICK WALSH, JOHN ROGERS CARROLL, BERNARD L. LEMISCH and RAY E. MACHEN, for a writ of certiorari to review a decision of the Supreme Court of Pennsylvania rendered May 27, 1964, which denied petitioners an appeal from the Superior Court of Pennsylvania which affirmed a judgment of conviction of conspiracy of the Quarter Sessions Court of Philadelphia, Pennsylvania.

## CITATIONS TO OPINIONS BELOW.

The opinion of the trial court (supplemental record) is unreported.

The opinion of the Superior Court of Pennsylvania printed in the Appendix "C" hereto (p. 3a) was handed down March 19, 1964, and is reported in — Pa. Superior Court —, 199 A. 2d 139, dissent page 159.

The order of the Supreme Court of Pennsylvania is unreported and printed in the Appendix "A" hereto (p. 1a).

## JURISDICTION.

The judgment (order) of the Supreme Court of Pennsylvania was entered on May 27, 1964, Appendix "A" hereto (p. 1a). The jurisdiction of this Court is invoked under 28 U. S. C., § 1257(3).

## QUESTIONS PRESENTED.

1. Whether action by a state court compelling defendants in a state criminal case to be tried on an indictment found by a grand jury on a district attorney's bill, petition for which discloses no emergency but only the risk of the expiration of the state Statute of Limitations, where the delay was occasioned by the district attorney's lack of due diligence, violates the Due Process Clause of the Fourteenth Amendment of the Federal Constitution?

2. Whether action by a state court where defendants were called for trial on a charge of conspiracy (misdemeanor) and where the court sequestered the jury immediately after it was completed after having instructed the panel from which it was chosen that there was but a remote possibility that at some later date it might be necessary to lock them up in the interest of justice; restricted all six defendants to but six peremptory challenges (collectively); admitted testimony and exhibits of an inflammatory nature;

and injected itself into the trial of the cause in a manner most prejudicial to the defendants; violates the due process clause of the Fourteenth Amendment to the Federal Constitution?

3. Whether a state court's action (Superior Court of Pennsylvania) in denying defendants' petitions for continuance on two separate occasions, where the defendants were compelled to file an immediate appeal from the judgment and sentence of the trial court (Quarter Sessions Court of Philadelphia) which refused to allow petitions for special supersedeas, violates the provisions of the Sixth Amendment to the Federal Constitution?

4. Did the admission of evidence of crimes not charged in the indictment violate the defendants' constitutional rights?

5. Have the Pennsylvania Courts interpreted the Statute of Limitations in such fashion as to deprive the defendants of due process of law because of vagueness?

## CONSTITUTIONAL PROVISIONS INVOLVED.

The Constitutional provisions involved are Section 1 of the Fourteenth Amendment containing the due process clause which provides:

> ". . . NOR SHALL ANY STATE DEPRIVE ANY PERSON OF LIFE, LIBERTY OR PROPERTY WITHOUT DUE PROCESS OF LAW . . ."

and the Sixth Amendment which provides:

> "IN ALL CRIMINAL PROSECUTIONS, THE ACCUSED SHALL ENJOY THE RIGHT . . . TO BE INFORMED OF THE NATURE AND CAUSE OF THE ACCUSATIONS; AND TO BE CONFRONTED WITH THE WITNESS AGAINST HIM . . . AND TO HAVE THE ASSISTANCE OF COUNSEL FOR HIS DEFENSE."

## STATEMENT.

Petitioners, five of six in number, were indicted on a charge of conspiracy to cheat and defraud. Prior to the action of the grand jury, the defendants had not been given a preliminary hearing, the indictment having been presented to the grand jury after a common pleas judge had granted the district attorney's petition to proceed without a preliminary hearing.

Five days later, on September 23, 1959, upon being apprised of the indictment, the defendant Raymond Cohen surrendered to the district attorney under that indictment as returned by the September 1959 Grand Jury, and on the same day filed a petition for a writ of habeas corpus alleging illegal detention.

The writ of habeas corpus was, after hearing, dismissed and an appeal was taken to the Superior Court of Pennsylvania. That appeal was later withdrawn on a subsequent decision of the Superior Court in *Commonwealth, ex rel. D. Ward Nichols v. Lederer*, 193 Pa. Superior Ct. 482 (1960, affirmed by the Supreme Court of Pennsylvania, 404 Pa. 218 (1961)), which involved the same issue as in the then instant case, and which ruled that dismissal of a petition for a writ of habeas corpus was but an interlocutory order and not appealable because the petitioner still had available to him, on the same reasoning contained in the habeas corpus petition, the remedy of a motion to quash the indictment in the Court of Quarter Sessions where the case was scheduled to be tried, which remedy he was compelled to pursue.

Thereafter, a motion to quash the indictment was filed which after hearing by a court en banc was denied.

The matter came to trial on March 25, 1963, and the Commonwealth concluded the presentation of evidence on June 3, 1963, whereupon the defendants filed demurrers which the trial judge overruled. The defendants then rested and filed motions for binding instructions request-

ing the court to direct the jury to find the defendants not guilty, which was refused.

After conviction by the jury, the defendants filed motions and reasons for a new trial and in arrest of judgment which, after argument, were denied.

On July 15, 1963, the defendants were fined and sentenced to prison terms. The trial court refused to admit the defendants to bail pending the taking of an appeal; whereupon, defendants were compelled to perfect appeals to the Superior Court of Pennsylvania, a judge of which then granted supersedeas.

As a matter of Chronology, when the defendants were compelled to perfect appeals to the Superior Court (July 15, 1963) in order to remain at liberty pending the determination of the appeals, the cases were automatically listed for argument in the appellate court on September 9, 1963.

Two petitions praying for continuance were filed with the Superior Court (July 19, 1963, and August 13, 1963) which were peremptorily refused without hearing.

The Superior Court of Pennsylvania heard arguments on September 9, 1963, and on March 19, 1964, affirmed, one judge dissenting; and on April 14, 1964, refused a petition for reargument. Immediately thereafter, petitions for allowance of appeals from the Superior Court to the Supreme Court were filed, which, on May 27, 1964, without hearing or argument, were refused.

The question of the legality of a bill of indictment by the grand jury without a preliminary hearing; the circumstances surrounding the sequestration of the jury; the allowance of but six peremptory challenges to six defendants (collectively); the admission of inflammatory testimony and exhibits, and the court injecting itself into the case in a most prejudicial manner to the defendants, were all raised by counsel at the trial level; the denial of due process under the Fourteenth Amendment and the violation of the Sixth Amendment were raised by counsel at the trial level and in the appellate courts, by objections at the trial and on petitions to the appellate court.

## REASONS FOR GRANTING THE WRIT.*

**1. Action by a State Court Compelling Defendants in a State Criminal Case to Be Tried on an Indictment Found by a Grand Jury on a District Attorney's Bill, Petition for Which Discloses No Emergency But Only the Risk of the Expiration of the State Statute of Limitations, Where the Delay Was Occasioned by the District Attorney's Lack of Due Diligence, Violates the Due Process Clause of the Fourteenth Amendment of the Federal Constitution.**

The decision of the trial court in refusing to grant motions to quash the bill of indictment and compelling the defendants to go to trial clearly violated the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

Although "DUE PROCESS OF LAW" seems incapable of exact definition, it generally means law in the regular course of administration through the courts of justice in conformity to rules which throughout the years have been established to protect the individual's human rights. *Brown v. State of New Jersey*, 175 U. S. 772; *Pedigo v. Celanese Corporation*, 388 U. S. 937, 94 L. ed. 578.

The essential elements of due process are "NOTICE AND OPPORTUNITY TO BE HEARD AND TO DEFEND IN AN ORDERLY PROCEEDING ADAPTED TO THE NATURE OF THE CASE BEFORE A TRIBUNAL HAVING JURISDICTION OF THE CAUSE." *Carten v. Kubler*, 320 U. S. 243, 88 L. ed. 26; *Ohio Bell Telephone v. Public Utilities Comm. of Ohio*, 301 U. S. 292,

* Another defendant in this proceeding, Ben Lapensohn, is filing a separate petition for writ of certiorari. Insofar as applicable to these petitioners, the reasons contained in that petition are adopted by reference.

81 L. ed. 1093. While "THERE IS NO TABLE OF WEIGHTS OR MEASURES FOR ASCERTAINING WHAT CONSTITUTES DUE PROCESS." *U. S. v. Witmer*, 115 F. Supp. 19, affirmed 348 U. S. 376, 99 L. ed. 428; each factual situation must be closely examined to determine the applicability of the principle of due process.

This Court in *Betts v. Brady*, 316 U. S. 445, 86 L. ed. 1595, said "ASSERTED DENIAL (OF DUE PROCESS) IS TO BE TESTED BY AN APPRAISAL OF THE TOTALITY OF FACTS IN A GIVEN CASE."

In *Lisenba v. California*, 314 U. S. 219, the court insisted that due process is denied when there is a failure to observe that fundamental fairness essential to the very concept of justice; and in *Link v. Wabash R. Co.*, 37 U. S. 626, 8 L. ed. 2d 734, the court indicated that "THE FUNDAMENTAL REQUIREMENT OF DUE PROCESS IS AN OPPORTUNITY TO BE HEARD UPON SUCH NOTICE AND PROCEEDINGS AS ARE ADEQUATE TO SAFEGUARD THE RIGHT FOR WHICH THE CONSTITUTIONAL PROTECTION IS INVOKED."

In this case, fundamental fairness was completely and definitely lacking, and the defendants were denied due process of law when they were not apprised of the charge against them, having been denied a preliminary hearing where they could have heard the accusations, faced their accusers, been given an opportunity to cross-examine them so that they would then have been adequately conditioned to prepare a defense. The answer that a defendant had available to him the process of the court to demand and receive a bill of particulars falls far short of that which a defendant charged with crime is entitled to under the provisions of the Constitution of the United States, because a bill of particulars in most cases, after denial of a preliminary hearing, as happened here, does not adequately set forth the facts and circumstances surrounding the basis for the charge and cannot be substituted for a preliminary hearing.

In the Commonwealth of Pennsylvania it has been recognized since time immemorial that the normal, common, proper and just method of procedure of charging one with the commission of crime is by arrest, an adversary preliminary hearing in which the defendant can participate, a binding over to the Court of Quarter Sessions, and a bill of indictment returned by a grand jury based upon the return of a magistrate.

From the earliest days in the Commonwealth of Pennsylvania as indicated in the case of *Lloyd and Carpenter*, 3 Clark 188 (1845) followed by *Commonwealth v. O'Brien*, 181 Pa. Superior Ct. 382 (1956) persons charged with the commission of crime had the right to a preliminary hearing.

These cases were followed by *Commonwealth v. Hoffman*, 396 Pa. 491 (1959) where the Supreme Court of Pennsylvania made it clear, once and for all, that a defendant has the right to a preliminary hearing. The court in interpreting the Act of May 14, 1915, P. L. 499 (42 P. S. 1080) held that the petitioners were entitled to a preliminary hearing to which they had a positive legal right, and the denial of such a hearing made void all subsequent proceedings.

It is only in exceptionally special cases that a district attorney is warranted in presenting a petition to the court for permission to bypass a preliminary hearing and to proceed directly to the grand jury.

In this case, the defendants always insisted that there was no adequate reason given other than that which became crystal clear on a reading of the testimony that the reason was nothing more than the lack of due diligence on the part of the district attorney when he assigned as his reason for bypassing a preliminary hearing the risk of the expiration of the statute of limitations. This risk was created by the negligence and lack of due diligence of the district attorney. There was no real emergency in this case, and no need for such precipitous action, since several months prior to the date of the expiration of the statute

of limitations the district attorney testified that he was in a position to present the same case to the grand jury that he presented after allowance of the petition. If he had acted at the earlier time, when he was in possession of the same facts and evidence, the defendants would have been provided with a preliminary hearing at which they could have been present and afforded the safeguards guaranteed them by the constitution. Certainly the right to a preliminary hearing which the Supreme Court in the *Hoffman* case said was so vital and fundamental that the deprivation of such a hearing voided all subsequent proceedings.

Further, there is no allegation in the district attorney's petition, nor were any facts presented, that the public good demanded the filing of a district attorney's bill; since it has always been the law in the Commonwealth of Pennsylvania that the law officers of the commonwealth must always exercise their powers cautiously, generally under the direction of the courts, and never unless convinced that the general public good demanded it.

Where the crime charged is not directed at the public generally, then the basis for a district attorney's bill must be based on some act of the defendant, which had prevented their having had a preliminary hearing and which had created the risk of the expiration of the statute of limitations.

Here, the defendants had done nothing to cause the delay, have always been available, and should not have been treated differently from any other person charged with the commission of a crime.

**2. Action by a State Court Where Defendants Were Called for Trial on a Charge of Conspiracy (Misdemeanor) and Where the Court Sequestered the Jury Immediately After It Was Completed After Having Instructed the Panel From Which It Was Chosen That There Was But a Remote Possibility That at Some Later Date It Might Be Necessary to Lock Them Up in the Interest of Justice; Restricted All Six Defendants to But Six Peremptory Challenges (Collectively); Admitted Testimony and Exhibits of an Inflammatory Nature; and Injected Itself Into the Trial of the Cause in a Manner Most Prejudicial to the Defendants Violates the Due Process Clause of the Fourteenth Amendment to the Federal Constitution.**

Immediately upon the case going to trial, the court in addressing the panel from which the jurors were drawn, informed them that there was only a remote possibility at some later date it might be necessary to cause them to be locked up in the interest of justice and then immediately after they were selected and sworn, ordered them sequestered.

At the trial, the court acted in a manner most prejudicial to the defendants, and denied them a fair trial when it held meetings (excluding the defendants and their counsel) in chambers with witnesses for the commonwealth who had previously indicated they did not desire to testify and prevailed upon them to testify; when it refused to permit the cross-examination of a commonwealth witness (BATTISFORE) so as to place her in her proper setting (a situation most similar to *Alford v. United States*, 228 U. S. 682, where there was a reversal for this very reason); when it permitted the jury to view a number of out sized cardboard charts allegedly setting up in graphic form a visual statement of the defendant Cohen's alleged financial transactions. These charts were concerned only with an arbitrary period and were proved to be inaccurate, having been hastily prepared after a scanty and limited investigation. In *U. S. v. Holland*, 348 U. S.

121; this method of computing a person's assets was characterized as being fraught with danger for the innocent so that it called for the closest scrutiny by the court, a precaution not taken in this case, when the court ruled on defense counsel's objections in a sarcastic and antagonistic manner and characterized objections and motions made by counsel as being without merit, vain, completely without merit, accused counsel of being "LESS THAN FRANK" and sustained an objection after soliciting the district attorney to make one.

The defendants were denied due process and a fair trial when the court ruled that all of the defendants collectively (six in number), who were tried en masse, were entitled to only that number of peremptory challenges (six) which any one defendant was entitled to if tried alone, thereby prejudicing all the defendants by reducing the number of peremptory challenges from six, if each defendant was tried alone, to but one, and as it actually transpired upon the selection of the jury, to none, since each individual defendant did not get the opportunity to challenge any juror.

Although it is true that there is no constitutional guarantee of peremptory challenges in a criminal trial, once the legislature authorized peremptory challenges, then the constitutional guarantee of equal protection of laws under the Fourteenth Amendment to the Constitution of the United States comes into play.

The law is void if it operates in a discriminatory manner and denies equal protection of laws by prescribing different procedures in a case of persons in like situations.

Here, we have the situation where the legislature allowed six peremptory challenges to a defendant called for trial in a criminal case, but because he was there indicted with five other persons and brought to trial en masse he is, in essence, denied the right to himself peremptorily challenge six prospective jurors because the court allowed only that number to all defendants called for trial at the same time.

Wherefore, we respectfully suggest that Sect. 40 of the Act of 1860, P. L. 427, is unconstitutional and violates the defendants' rights as guaranteed and protected by the Fourteenth Amendment to the Constitution of the United States in that it deprived the defendants of due process and equal protection of laws. It violates and discriminates against persons of the same and designated class, committing the same crime or similar offense, by denying them an equal number of challenges when called for trial en masse.

**3. A State Court's Action (Superior Court of Pennsylvania) in Denying Defendants' Petitions for Continuance on Two Separate Occasions, Where the Defendants Were Compelled to File Immediate Appeals From the Judgment and Sentence of the Trial Court (Quarter Sessions Court of Philadelphia) Which Refused to Allow Petitions for Special Supersedeas, Violates the Provisions of the Sixth Amendment to the Federal Constitution.**

The Sixth Amendment to the Constitution of the United States provides that in all criminal prosecutions the accused shall enjoy the right to have the assistance of counsel for his defense, and also that it is within the intendment of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States that when accused, a defendant shall be entitled to the assistance of counsel at all times, and that the denial of the effective assistance of counsel to one charged with crime violates due process. *Hawk v. Olsen*, 326 U. S. 271, 90 L. ed. 61; *Wade v. Mayo*, 334 U. S. 672.

This case came on for trial on March 23, 1963, and lasted ten weks and one day (March 23, 1963, to June 3, 1963), the jury returning a verdict of guilty on June 3, 1963, near midnight.

The court immediately disclosed a precise time table for motions and arguments to follow: all motions for a new trial and in arrest of judgment and all supplementary reasons were to be filed by June 17, 1963; briefs were to be

filed by July 3, 1963, and argument to be had on July 10, 1963. All motions were then denied and the defendants called in for sentence on July 15, 1963. Immediately upon sentencing, the defendants presented petitions for supersedeas which the court denied. That denial to grant supersedeas compelled the defendants to immediately file appeals to the Superior Court, thereby denying to them the forty-five days allowed by law to perfect appeals.

When the defendants were compelled, in order to remain at liberty under bail, to perfect appeals to the Superior Court on July 15, 1963, the matter was automatically listed for argument in the Superior Court of Pennsylvania on September 9, 1963.

If the provisions contained in the Sixth Amendment are to be taken seriously then it becomes apparent that the defendants were denied effective assistance of counsel when the trial court refused to grant supersdeas and compelled the perfection of appeals to the Superior Court on July 15, 1963. The error was then compounded by the Superior Court when it peremptorily refused to continue argument when appealed to for that purpose on two separate occasions.

Obviously, counsel for the defendants after a ten week and one day trial and the immediate preparation of motions, briefs and argument of the same within an additional five weeks, and the preparation of a brief and argument in the Superior Court within an additional two months (September 9, 1963), who were also called upon to carry on active law practices were not in the best condition, physically or mentally, to effectively present the matter to the best of their abilities.

**4. The Admission of Evidence of Crimes Not Charged in the Indictment Violates the Defendant's Constitutional Rights.**

The reason this Court should grant review on this issue is that the action of the courts below appears to petitioners to violate fundamental principles of constitutional law pre-

viously announced by this Court. This Court has held in *Cole v. Ark.*, 333 U. S. 196, and *De Jonge v. Oregon*, 229 U. S. 353, and *Stirone v. U. S.*, 361 U. S. 212, 4 L. ed. 2d 252, that:

> "No principle of procedural due process is more clearly established than that notice of the specific charge and a chance to be heard in the trial of the issue raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal." (*Cole, supra*)

In this case, the defendants were charged in a one-count indictment with conspiracy to cheat and defraud Local 107 of the Teamsters Union of its property. The trial court admitted evidence of such crimes as larceny, fraudulent conversion, embezzlement, extortion as well as threats of violence and a variety of other conduct some criminal and some merely suspicious, none of which was encompassed in the indictment. The defendants made seasonable objection, specifically stating the Fourteenth Amendment as a reason. This contention was considered and passed upon by all of the courts below.

**5. The Pennsylvania Courts Have Interpreted the Statute of Limitations in Such Fashion as to Deprive the Defendants of Due Process of Law Because of Vagueness.**

The reason this Court should grant review on this issue is that the Superior Court of Pennsylvania held that the Statute of Limitations for the crime of conspiracy to cheat and defraud runs from "not later than the time when the check should have been presented for payment", and "at the expiration of a reasonable time after delivery of the instrument".

The Court was referring to the fact that the last overt act shown in the evidence was that Joseph Grace (a defendant who died before trial) received on September 16, 1957

a check from Local 107 of which he was then President in the amount of $2,500.00, and that check was cashed by some unknown person on September 19, 1957. The indictment was not found until September 18, 1959. Petitioners believe that this interpretation of the Statute of Limitations places persons in indefinite jeopardy of conviction for offenses normally barred by the statute of limitations.

Petitioners believe that this decision is inconsistent with the principles announced by this Court in *Lanzetta v. N. J.*, 306 U. S. 451, and *Musser v. Utah*, 333 U. S. 95.

## CONCLUSION.

For the foregoing reasons, and for the reasons set forth in the Petition of Ben Lapensohn, your petitioners pray that a Writ of Certiorari issue directed to the Supreme Court of the Commonwealth of Pennsylvania to the end that this cause may be reviewed and determined, and that the judgment of the Supreme Court of the Commonwealth of Pennsylvania be reversed and for such other and further relief as may seem proper.

Respectfully submitted,

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